MOTION FILED
JUL 28 1989

(3)

No. 88-2130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

v.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Illinois Attorneys for Criminal Justice ("IACJ") hereby move for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case. The consent of the Petitioner has been obtained. The consent of the Respondent was requested but refused.

STATEMENT OF INTEREST

IACJ is an independent non-profit organization of criminal defense lawyers, whose stated purpose is to promote justice and dignity for criminal defendants, their lawyers, and for the criminal justice system itself. IACJ, through its publications and other resources which serve the criminal defense bar, seeks to foster and maintain the integrity, independence and expertise of criminal defense lawyers in Illinois. Consistent with these purposes, IACJ makes frequent appearances as *amicus curiae* in cases of importance.

The case at bar is such a case. Here, Petitioner has been disbarred from the practice of law by the Illinois Supreme Court for making rental car reservations for judges and non-judicial public employees in 1981-1984. This ultimate sanction was imposed even though Petitioner's conduct with respect to certain judges was adjudicated under the aegis of a wholesale amendment of a disciplinary rule which was not promulgated until years *after* the conduct complained of occurred. Even more egregiously, Petitioner's conduct with

respect to non-judicial public employees was expressly relied upon by the Court below as a basis for disbarment despite the fact that *no* disciplinary rule existed governing such conduct at the time it occurred.

REASON FOR BRIEF AMICUS CURIAE

The result reached by the Illinois Supreme Court in the instant case depended upon the application of a species of *ex post facto* legislation; IACJ is therefore greatly concerned that a dangerous precedent has been set which tramples elementary principles of fairness and equity. The Illinois Supreme Court's unprecedented action affects all segments of the bar, and attorneys in Illinois must now live with the threat of disciplinary proceedings to review conduct thought to be innocent at the time it occurred. IACJ believes that this dangerous precedent abridging fundamental rights without fair warning must be constrained. As an organization of attorneys that represents criminal defendants and serves the interests of the entire criminal justice system, IACJ is alarmed by the manner in which the Illinois Supreme Court applied newly promulgated disciplinary rules to penalize Petitioner's past conduct.

CONCLUSION

Through its efforts to maintain the integrity of the criminal justice system, IACJ has an abiding interest in the fair and uniform administration of justice in the State of Illinois, and the protection of citizen's rights against the arbitrary and unjust exercise of legislative power in derogation of individual rights. Because of the importance of the issues raised in the present case, and their implications for individual rights, IACJ respectfully requests leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

Illinois Attorneys for
Criminal Justice

By Its Attorney,

Jed Stone

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STATEMENT OF INTEREST

Please see the Motion for Leave to File Brief *Amicus Curiae*, *supra*, for the Statement of Interest of Illinois Attorneys for Criminal Justice in this case.

REASONS FOR GRANTING THE WRIT

This case involves the permanent disbarment of Petitioner Oscar O. D'Angelo from the practice of law in the State of Illinois. The court below imposed the ultimate professional sanction by retroactively applying a disciplinary rule governing gifts to judges promulgated in 1988 to Petitioner's conduct in 1981-84. *See In Re D'Angelo*, 126 Ill.2d 45, 53-56, 533 N.E.2d 861, 864-66 (1988). Even more inexplica-

bly, Petitioner's conduct with respect to non-judicial public employees was penalized in the absence of any disciplinary rule regulating an attorney's relationship with such public officials. *Id.* at 56-57, 533 N.E.2d at 866-867.

The latter aspect of the decision below was unprecedented and patently unforeseeable: Before this case, there was simply no rule which even addressed, let alone prohibited, transfers of value from an attorney to a non-judicial public official. Plainly, too, the Illinois Supreme Court's application of its 1988 amendment of the disciplinary rule governing gifts to judges[1] to Petitioner's conduct in 1981-84 was arbitrary and wholly unforeseeable.

This Court has just recently granted a petition for a writ of certiorari to review the Illinois Supreme Court's abridgement of First Amendment rights in an attorney discipline case. *Peel* v. *Attorney Registration and Disciplinary Commission of Illinois*, 126 Ill. 2d 397, 534 N.E.2d 980 (1989), *cert. granted*, 58 U.S.L.W. (July 3, 1989) (No. 88-1775). As in that case, the decision below implicates vital constitutional principals. First, the actions of the Illinois Supreme Court contravened the express prohibition in Article I, Section 10 of the United States Constitution that "no State shall pass any *ex post facto* law." Second, the court's actions infringed the Due Process Clause of the Fourteenth Amendment, which prohibits the retroactive application of an unforeseeable judicial construction of a statute which expands the scope of prohibited conduct.

By imposing a professional death sentence on Petitioner in the manner outlined above, the Illinois Supreme Court reached beyond its constitutional limits. And the court turned an unfortunate prediction into a reality. As forecast, Petitioner has been "offered as a sacrificial goat for the Bar, to satisfy its own need of demonstrating to the public that

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[1] Rule 7-110(a) of the Illinois Code of Professional Responsibility.

the Bar is cleansing its own house."[2] This Court should grant the writ and give Petitioner the opportunity to be judged fairly.

I. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE EX POST FACTO CLAUSE APPLIES TO LEGISLATIVE ACTS OF A COURT.

Although this Court has held that the Ex Post Facto Clause applies directly only to legislative acts,[3] the question in the present case is whether the Clause should apply to the legislative acts of a court. It should.

It cannot be seriously disputed that the court below, when it promulgated its new Rule 7-110(a) in June 1988, was acting in a legislative capacity.[4] The Illinois Supreme

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[2] Opinion of the Chair of the Hearing Board, Petition at App. 43a. The Chairperson's warning expressed a concern that Petitioner, a prominent Chicago attorney, should not become a scapegoat for those who have been justifiably outraged at the revelations of judicial corruption revealed by the federal government's undercover investigation of the Cook County, Illinois court system. Unfortunately, Petitioner, who was not even called as a witness in any of the trials resulting from this investigation, has apparently become such a scrapegoat.

[3] *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Ross* v. *Oregon*, 227 U.S. 150 (1913).

[4] The Illinois Supreme Court adopted this new disciplinary rule in *In Re Corboy*, 124 Ill. 2d 29, 528 N.E.2d 694 (1988). Before the *Corboy* decision, Rule 7-110(a) provided that "[a] lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal. . . ." Although the old rule, on its face, appeared to be absolute, the Illinois Supreme Court had expressly acknowledge that "the limits [of the rule] had not been defined and this lack of definition [had] created uncertainty among practicing attorneys as to precisely what conduct [was] prohibited." *In Re Jones*, 125 Ill.2d 371, 381, 532 N.E.2d 239, 244 (1988). As the Court further noted, there has been "considerable belief among members of the bar" that the old rule did not establish a flat *per se* ban gifts to judges, but rather prohibited only those gifts "moti-

(footnote continued on next page)

Court's promulgation of rules governing attorney conduct is distinctly legislative. Indeed, as regards its rule-making and legislative capacity, the Illinois Supreme Court recently reaffirmed that it has the "sole authority to regulate and discipline attorney conduct" and "possesses the inherent and exclusive power to regulate the practice of law in this State." *People ex rel. Brazen* v. *Finley*, 119 Ill.2d 485, 492-493, 519 N.E.2d 893, 901-902 (1988); *see also In Re Day*, 181 Ill. 73, 54 N.E. 646 (1899); *In Re Mitan*, 119 Ill.2d 229, 518 N.E.2d 1000 (1987).

As this court has recently held, state courts can legislate.[3] And state courts necessarily exercise legislative power in promulgating disciplinary rules. The Illinois Supreme Court indisputably exercised its legislative power in *Corboy* by expressly announcing a new rule of general applicability which imposed standards on all members of the bar, exactly as a legislature would function in enacting a statute. The court also exercised its legislative power, albeit in a less straightforward way, when it held below that it is a sanctionable exercise of "clout" for an attorney to give something of value to a non-judicial public official. *See In Re D'Angelo*, *supra*, at 56, 533 N.E.2d at 866.

(footnote continued from preceding page)

vated by an intent to influence." *In Re Corboy*, *supra*, at 38, 528 N.E.2d at 698. In *Corboy*, the court expressly amended the old rule to specifically identify the types of gifts to judges which were permissible. All others were henceforth prohibited. *Id.* at 40-45, 528 N.E.2d at 698-701. In *Corboy*, though, the court declined to apply the new rule retroactively since "it would be unfair to apply the limitation we have today for the first time defined to . . . conduct [which occurred] in 1981." *Id.* at 49, 528 N.E.2d at 700. Despite this sensitivity to the problems inherent in the retroactive application of its new rule, the court below nevertheless judged Petitioner under the new rule, even though it did not exist at the time of the conduct at issue.

[3] *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719, 731 (1980).

Since a court which issues disciplinary rules of general applicability is clearly acting as a legislature, the constitutional rules which apply to legislative acts should perforce govern the promulgation of such rules. The Ex Post Facto Clause should, therefore, be applied to the legislative acts of the court below.

II. THIS COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER THE EX POST FACTO CLAUSE APPLIES TO ATTORNEY DISCIPLINARY PROCEEDINGS.

This case presents the issue of whether the Ex Post Facto Clause, which has long been held applicable only to criminal proceedings,[6] should apply to attorney disciplinary proceedings. While this Court has recognized that such proceedings are "adversary proceedings of a quasi-criminal nature," and that disbarment "is a punishment or penalty imposed on the lawyer," *In Re Ruffalo*, 390 U.S. 544, 550-551 (1968), there is nevertheless a distinct split in the Circuit Courts of Appeal as to the nature of disciplinary proceedings.

The District of Columbia, Fifth and Eighth Circuits have recognized that such proceedings are quasi-criminal in nature;[7] while the Third, Seventh, and Ninth Circuits have ruled that disciplinary proceedings are neither criminal nor

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[6] *Calder* v. *Bull*, 3 U.S. (Dall.) 386 (1798); *Bankers Trust Corp.* v. *Blodgett*, 260 U.S. 647 (1923); *Galvan* v. *Press*, 347 U.S. 522 (1954).

[7] *In Re Thalheim*, 853 F.2d 383 (5th Cir. 1988) ("attorney disbarment and suspension cases are quasi-criminal in character; therefore, court's disciplinary rules must be read strictly, resolving any ambiguity in favor of attorney); *Charlton* v. *FTC*, 543 F.2d 903 (D.C. Cir. 1976) ("disciplinary proceedings are adversary proceedings of quasi-criminal nature and disbarment, designed to protect public, is punishment or penalty imposed on lawyer"); *Goodrich* v. *Supreme Court of South Dakota*, 511 F.2d 316 (8th Cir. 1974) ("state disbarment proceedings are quasi-criminal in nature").

civil.[8] The Second Circuit has held that a "court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding," since "for most attorneys the license to practice law represents their livelihood, the loss of which may be greater punishment than a monetary fine." *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209-10 (2d Cir. 1972).

Some courts have held that the Ex Post Facto Clause is not applicable to disciplinary proceedings, yet other courts have reasoned that to impose disbarment retroactively would be unjust when applied to conduct that was not clearly prohibited when it took place. These Courts have therefore applied the principles of the Ex Post Facto Clause to disciplinary proceedings without specifically invoking the Clause.[9]

The Ex Post Facto Clause's strict limitation to criminal cases has thus created judicial tension in disciplinary proceedings as courts strive to avoid patently unjust results caused by retroactive application of disciplinary rules. This Court should grant the writ to resolve this tension and to make clear that the Ex Post Facto Clause applies to attorney disciplinary proceedings.

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[8] *In Re Ross*, 735 F.2d 1168 (9th Cir. 1984) ("nature of disciplinary proceeding is neither civil nor criminal, but an investigation into conduct of lawyer-respondent"); *In Re Abrams*, 521 F.2d 1094 (3rd Cir. 1975) ("although disbarment proceeding is not criminal in nature, its consequences remove it from ordinary run of civil cases"); *In Re Echeles*, 430 F.2d 347 (7th Cir. 1970) ("disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, *sui generis*, and result from the inherent power of courts over their officers").

[9] *See, e.g., Sexton* v. *Supreme Court Committee on Professional Conduct*, 747 S.W.2d 94 (Ark. 1988) (attorney's conduct could not be subject to retroactive examination under a new rule); *see also In Re Inquiry Concerning a Judge*, 357 So.2d 172 (Fla. 1978) (retroactive application of newly promulgated rule to judge's past conduct would violate due process).

III. THIS COURT SHOULD GRANT THE WRIT TO REAFFIRM THAT DUE PROCESS PROHIBITS UNFORESEEABLE JUDICIAL EXPANSION OF PUNITIVE PROVISIONS.

The Due Process Clause of the Fourteenth Amendment forbids the retroactive application of an unforeseeable judicial expansion of punitive provisions. When courts unforeseeably expand rules to embrace conduct not previously covered, due process precludes the retroactive application of the new interpretation.

This Court first articulated the foregoing principle in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, this Court reversed the South Carolina Supreme Court's construction of a trespass statute, concluding that the court's action was so unforeseeable that individuals were not provided fair warning that their conduct violated the law.

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids. [378 U.S. at 352-354.]

As stated in *Bouie*, due process bars "retroactive criminal prohibitions emanating from courts as well as legislatures." *Id.* at 354.

Bouie has been liberally construed as applying *ex post facto* principles to judicial decisions under the rubric of due process. As one court has noted, "[a]lthough the *ex post facto* prohibition * * * literally applies only to legislative acts, the Supreme Court has incorporated the principle upon which the prohibition rests into the due process clause of the Fifth and Fourteenth Amendments."[10]

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[10] *Knapp* v. *Cardwell*, 667 F.2d 1253, 1262 (9th Cir. 1982).

The due process significance of prior notice in disciplinary proceedings has been recognized by this Court. In *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), this Court stated that " '[a] relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed,' " and that "it may well be" that disbarring an attorney for the violation there at issue would raise "significant due process concerns." 471 U.S. at 653 n.15.

Such concerns are raised by the action of the court below. Even if these actions were not legislative in nature; even if Petitioner's disciplinary proceedings were not quasi-criminal; the decision of the court below nevertheless violated fundamental notions of due process. This Court should grant the writ to reaffirm that the due process principles first enunciated in *Bouie* apply with full force in attorney disciplinary proceedings.

* * *

Petitioner has been subjected to the ultimate professional sanction of disbarment for conduct that was not prohibited when it occurred. The Supreme Court of Illinois announced a new disciplinary rule in *Corboy*, and then applied that rule retroactively to disbar Petitioner. The court itself expressly recognized the potential for injustice in choosing not to apply the new rule retroactively to the attorneys before it in *Corboy*; yet it did just that to Petitioner. Moreover, and perhaps even more outrageously, the court below punished Petitioner's conduct with non-judicial public employees, even though there was no rule prohibiting or even regulating such conduct at the time it occurred.

The court's retroactive application of its newly-announced rule and its unforeseeable construction of existing rules not only deprived Petitioner of his livelihood, these unprecedented actions also directly implicate important constitutional principles under the Ex Post Facto and Due Process Clauses.

CONCLUSION

For the reasons stated above, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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